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No. 84-1582

In The
Supreme Court of the United States
October Term, 1984

R. S. MARTIN, JR., ET AL.
Petitioners,
v.
KILGORE FIRST BANCORP, INC.
and
KILGORE FIRST NATIONAL BANK
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are the provisions of 12 U.S.C. §215(d) satisfied by the auction of stock in a bank holding company incorporated under the laws of the State of Texas o rmust stock in a national banking association be auctioned to properly comply with 12 U.S.C. §215(d)?

LIST OF INTERESTED PARTIES

(1) R. S. Martin, Jr.
(2) Coca-Cola Bottling Co. (Biedenharn)
(3) James D. Ballinger
(4) Helen George Bolt
(5) Herbert Cashen
(6) Evelyn Cashen
(7) Herbert Cashen II
(8) Shack Cashen
(9) Gregory Cashen
(10) Mrs. Walter Chandler
(11) Alleyn Cim
(12) John T. Crim, Sr.
(13) L. N. Crim, Sr.
(14) L. N. Crim, Jr.
(15) Charles Duvall
(16) Crown Dickson
(17) D. L. Griffin
(18) Harold Hobenicht
(19) Louise Huffman
(20) Fulton Johnston
(21) James Dick Laird
(22) Mary F. Love
(23) E. B. Mobley
(24) Maxine L. Mobley
(25) Robert Mann c/o Omnibus Corporation
(26) Robert C. Overton
(27) Lois Laird Overton
(28) Robert Carter Overton III
(29) Nadine U. Parks
(30) Nell Laird Pederson
(31) Mrs. Camie Reich
(32) Maud Ovetton Stocker
(33) William Tennis
(34) Kilgore First National Bank
(35) Kilgore First Bancorp, Inc.

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COMES NOW, KILGORE FIRST BANCORP, INC., ET AL., Respondents, who hereby file this appearance and response in opposition to Petitioners' request for a Writ

of Certiorari to this Court to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

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STATEMENT OF JURISDICTION

On December 7, 1984, the United States Court of Appeals for the Fifth Circuit entered judgment affirming the interlocutory order of the trial court. Petitioners subsequently filed a Motion for Rehearing which was denied by the United States Court of Appeals for the Fifth Circuit on January 7, 1985.

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REASON FOR DENYING CERTIORARI

After the United States Court of Appeals for the Fifth Circuit denied Petitioners' Motion for Rehearing, Respondents registered the sale of holding company securities with the Securities and Exchange Commission. Respondent Kilgore First Bancorp, Inc. conducted the auction of holding company securities on March 1, 1985. Therefore, the Petitioners' request for a Writ of Certiorari is moot because the sale of securities upon which this litigation is based had already occurred before Petitioners filed their petition for certiorari with this honorable Court.

Further, Rule 17.1(c) of this Court states that a petition for certiorari may be granted when "a federal court of appeals has decided an important question of federal

law which has not been, but should be, settled by this Court . . . ". This Court in *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 468 U.S. —, 104 S. Ct. 3003, 82 L.Ed. 2d 158, 166 (June 28, 1984) and *Securities Industry Association v. Board of Governors of the Federal Reserve System,* 468 U.S. —, 104 S. Ct. 2979, 82 L.Ed. 2d 107, 113 (June 28, 1984), held that federal regulatory agencies should be accorded due deference and latitude in their interpretations of federal statutes. The Respondents in this case were simply following the logical interpretation of this statute as construed by the Office of the Comptroller of the Currency.

Supreme Court Rule 17.1(c) also provides that this Court may grant certiorari if the federal appellate court "has decided a federal question in a way in conflict with applicable decisions by this Court." It is interesting to note that in spite of hundreds of reverse triangular mergers approved by the Office of the Comptroller of the Currency, this is the first time a party has challenged the interpretation of the statute as established by the Office of the Comptroller of the Currency. Nor have the Petitioners been able to cite one case in support of their petition which shows that the United States Court of Appeals for the Fifth Circuit has decided this case in a way in conflict with applicable decisions of this Court or any other federal court.

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STATEMENT OF THE CASE

The majority of the board of directors of Kilgore First National Bank desired to reorganize the bank into a subsidiary of a one-bank holding company in order to take advantage of the increased powers and flexibility statutorily granted to one-bank holding companies. The board chartered an interim state bank and subsequently received approval from the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Texas Banking Department to reorganize the bank as a wholly-owned subsidiary of Kilgore First Bancorp, Inc.

The Respondent Kilgore First Bancorp, Inc., was required to obtain at least eighty percent of the stock of the subsidiary bank in order to file a consolidated tax return. Unsure of being able to receive eighty percent acceptance of the tender offer, the organizers of the holding company elected to accomplish the acquisition via a reverse triangular merger, which required a two-thirds shareholder approval.

In October 1982, the requisite two-thirds of the existing shareholders of Kilgore First National Bank voted to reorganize the bank into a wholly-owned subsidiary of Kilgore First Bancorp, Inc. As part of this plan, a reverse triangular merger was completed with an exchange of Kilgore First Bancorp, Inc. securities for Kilgore First National Bank stock.

The Petitioners herein timely filed their dissent to the transaction. Both Petitioners and Respondent Kilgore First Bancorp, Inc., requested that the Office of the Comptroller of the Currency cause an appraisal to be made.

Thereafter, in 1983, the Comptroller's Office issued an appraisal. All of the Petitioners herein were tendered and accepted cash for their shares.

Subsequent thereto, the Respondents pursuant to 12 U.S.C. §215(d) advertised the sale of the holding company securities which would have been delivered to Petitioners had they not dissented. A few days before the auction was to be conducted, Petitioners filed suit and obtained a temporary injunction forestalling the sale of any securities. Both the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit ruled favorably for Respondents.

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ARGUMENT

Respondents contend that the auction provisions of 12 U.S.C. §215(d) will lawfully be satisfied by the auction of the securities that the dissenting shareholders would have received had they not dissented. Respondents would argue that Petitioners misunderstood the mechanics of a reverse triangular merger as well as the intent of the applicable statute.

The reverse triangular merger calls for a one-step transaction: bank stock is tendered by the existing shareholders in the bank in exchange for holding company stock. It is not a two-step process as argued by Petitioners.

The statute in question, 12 U.S.C. §215(d), was written before the enactment of the Bank Holding Company Act of 1956, as codified at 12 U.S.C. §§1841-1850. The

statute, as originally drafted, did not contemplate the procedure of a phantom or interim bank being created to consolidate with an existing bank.

However, the Office of the Comptroller of the Currency has taken the position that 12 U.S.C. §215(d) should be interpreted such that stock "which would have been delivered" means holding company stock. The net result is that the bank is a wholly-owned subsidiary of the holding company. Other than the dissenters who declined to participate in the transaction, the shareholders who owned the bank have now effectively reorganized their ownership into the holding company.

The Office of the Comptroller of the Currency has consistently taken the approach that holding company stock should be exchanged for bank stock. Indeed this was discussed in 46 Fed. Reg. 16661, as published on March 13, 1982 and subsequently, as adopted in a regulation adopted at 12 C.F.R. §5.21 (1981).

Congress is well aware of the existence and popularity of one-bank holding companies, especially the use of interim banks and the merger process. These issues were discussed in Bank Holding Company Act Amendments of 1970, Pub. L. No. 91-607, 84 Stat. 1760 (1970); H.R. Rep. No. 387, 91st Cong., 2nd Sess. [1970]; S. Rep. No. 1984, 91st Cong., 2d Sess. [1970]. The Comptroller files an *Annual Report of the Comptroller of the Currency* which is provided to every member of the House and Senate Banking Committees each year. This report discusses the formation of one-bank holding companies through the chartering of an interim bank.

Therefore, Respondents argue here as did the Comptroller to the United States Court of Appeals for the Fifth Circuit that Congress has been aware for years of the direct exchange of holding company stock for bank stock in a corporate reorganization.

The statute at issue here provides that the auction to be conducted is of shares that "would have been delivered" to the dissenting shareholders. The shares that would have been delivered were holding company securities.

The purpose of §215(d) would be defeated if Petitioners' interpretation is followed. This section of the statute is designed to guarantee an equal footing between dissenting shareholders and non-dissenting shareholders. To allow dissenters to force an auction of surviving bank stock, which non-dissenters did not have the option to take, would give the dissenters an unequal treatment. The only reasonable conclusion and equitable application of §215(d) is that its auction provision can only apply to that stock which was delivered to non-dissenting shareholders and which dissenting shareholders had the option to take: stock of the holding company.

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CONCLUSION

For the foregoing reasons, it is respectfully argued that a petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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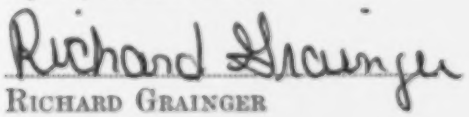

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